Supreme Court, U.S.
FILED

011400 MAR 20 2002

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GEORGE WARD TRAMMELL, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1)

WHETHER THE DISTRICT COURT ERRONEOUSLY PLACED THE BURDEN ON THE DEFENDANT TO DISPROVE FACTS TO WHICH HE OBJECTED AT SENTENCING?

(2)

WHETHER CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE PROPER PROCEDURE FOR A DISTRICT COURT TO FOLLOW WHEN A PARTY OBJECTS TO A FACT STATED IN THE PROBATION REPORT AND NO EVIDENCE OF THAT FACT IS OFFERED OR OTHERWISE BEFORE THE COURT, BEYOND THE REPORT ITSELF?

(3)

WHETHER THE DISTRICT COURT ERRED IN INCREASING THE SENTENCE BASED ON A VULNERABLE VICTIM ADJUSTMENT BASED ON "CLANDESTINE SEXUAL CONDUCT" BETWEEN THE DEFENDANT AND A PERSON WHO WAS NOT A VICTIM OF THE CRIME CHARGED, NOR THE VICTIM OF ANY OTHER CRIME?

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GEORGE WARD TRAMMELL,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, GEORGE WARD TRAMMELL III, respectfully prays that a writ of certiorari issue to review the decision of a panel of United States Court of Appeals for the Ninth Circuit affirming his sentence after a guilty plea to mail fraud.[1]

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[1] Petitioner pled guilty to two counts of mail fraud by which he deprived the People of the State of California of his honest services in his capacity as a State of California Superior Court judge in the County of Los Angeles.

OPINION BELOW

The opinion of the Circuit Court of Appeals affirming his sentence was an unpublished memorandum filed on December 20, 2001. The opinion is reproduced in the Appendix.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on January 31, 2002. The memorandum of the circuit court was filed on December 20, 2001. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves both constitutional law and federal sentencing law and procedure under the United States Sentencing Guidelines ("U.S.S.G."). Specifically, it involves the Fifth Amendment privilege against self-incrimination at sentencing, the proper procedure for the district court to follow when there is no evidence of a fact, but the United States Probation Report states such fact and the defendant objects to the fact. The Petition also presents questions of interpretation of the Guidelines themselves concerning the meaning of a "vulnerable victim," the meaning of "relevant conduct" and the application of a particular Guideline Section to which the parties stipulated to be the offense conduct. Finally, the Petition is concerned with whether the due process clause is

offended by a federal prosecutor who stipulates that no additional upward adjustments are appropriate, but then argues on appeal that district court not only was permitted to impose an additional upward adjustment but was required to do so under pre-existing case law.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions presented on this Petition were raised in the direct appeal from judgment of conviction in the district court. The opinion of the Court of Appeals sets out the evidence adequately to frame the federal constitutional issues presented, but in the opinion of Petitioner misstates the import of the record in certain respects. Specifically, the opinion states as a fact, the legal conclusion of the Court of Appeals that the district court did not impermissibly shift the burden of proof to the defendant at sentencing. (Opinion, p. 1.)

Petitioner entered into a plea agreement in which the parties stipulated to the operative facts, and to the appropriate calculation of the sentence under the Sentencing Guidelines. In that plea agreement, the Government agreed to recommend a sentence of 12-18 months.

No new facts arose after the entry of the plea agreement and Petitioner did not engage in any post-plea activity which rendered the plea agreement invalid or otherwise altered the Government's obligations under the plea agreement, or were relevant to the sentence.

Nevertheless, on the basis of information provided to the United States Probation Officer by the Government, the

Presentence Report ("PSR") recommended a substantially higher offense level calculation under the United States Sentencing Guidelines (U.S.S.G.) than the one stipulated as correct by the parties in the plea agreement. Two conclusions in the P.S.R. accounted for this difference: (1) although in the Plea Agreement the parties agreed that no upward adjustments not mentioned in the Plea Agreement were appropriate under the facts of the case, the P.S.R. concluded that the "victim" was not merely the collective "People of the State of California," but one of the parties before the court on which Petitioner sat as a judge, and further that the individual victim was "vulnerable" within the meaning of U.S.S.G., Section 3A1.1(b)(1); and (2) although the Plea Agreement included a stipulation that the base offense level would be based on U.S.S.G. Section 2C1.2, the P.S.R. argued for Section 2C1.7 and the district court agreed.

On October 4, 2000 Petitioner entered into a plea agreement with the Government which was accepted and approved by the district court. According to the terms of that plea agreement, Petitioner pled guilty to both counts in the Information, the parties stipulated to the "applicable sentencing guideline factors"and the parties entered into a "Stipulated Statement of Facts. The agreed Guideline calculation in the plea agreement would have resulted in a Adjusted Total Offense Level of 13, based on a base offense level of 7 (under U.S.S.G. § 2C1.2); an upward adjustment of 8 levels (based on the fact that the defendant was in a high-level decision making position (U.S.S.G. § 2C1.2(b)(2)(B)), and a two-level downward adjustment for acceptance of responsibility.

The parties further explicitly stipulated that "no additional specific offense characteristics, offense level adjustments, or departures apply . . ."

The parties extensively briefed the sentencing issues, and the United States Probation Officer filed a Probation Report ("PSR") and an Addendum to the PSR ("Addendum"). (All of the parties' sentencing briefs and filings were submitted under seal to the district court, and they are all submitted to this Court under seal as well, along with the PSR and Addendum.)

Defendant was sentenced on January 31, 2001. Despite the stipulation of Defendant and the Government, and despite objections by both the Government and Defendant, the district court followed the recommendation in the PSR to use a Guideline Section that resulted in a base offense level of 10, and to adjust the sentence upward under U.S.S.G. § 3A1.1(b)(1), finding Lo to be a "vulnerable victim."

Despite the recommendation in the PSR to impose a sentence at the low end of the range (which, based on the above rulings, was not 12-18 months as anticipated in the plea agreement, but 24-30 months), the district court imposed a sentence mid-range, of 27 months.

This appeal concerns only the district court's determination of the Guideline range, and of the custody portion of the sentence.

As this case concerns only sentencing, and as the "facts" of the case are primarily the arguments of the parties, the recommendations in the PSR, and the findings and rulings of the district court at the January 31, 2001 sentencing hearing, the following summary is necessarily brief.

Specific facts relating to the arguments and findings are included in the particular arguments which follow.

Sentencing Hearing (01-31-01)

At the sentencing hearing, the district court first announced that it agreed with the PSR, and disagreed with both the defense and prosecution's objection to the application of a different guideline from the stipulated guideline in the Plea Agreement. The PSR recommended applying U.S.S.G. Section 2C1.7, rather than the stipulated Section 2C1.2. The Court explicitly overruled both the Objection of the Government and the objection of the Defendant (Def. Obj. No. 8) to this part of the PSR.

Findings/Rationale For Base Offense Level

The apparent rationale for the court's ruling on this issue included its findings, articulated as follows:

> ". . . I acknowledge that sex could be a gratuity within the meaning of that guideline [2C1.2] and that context. But this case is not about sex. It's about fraud and the fraudulent abuse of power and betrayal of public trust." Underlining supplied.

Next the court focused on the title of the Guideline it chose to apply:

> "Guideline 2C1.7 explicitly and specifically is entitled 'Fraud Involving Deprivation of Intangible Right to the Honest Services of Public Officials' and that's precisely what the defendant has pled guilty to. So I conclude that 2C1.7 more specifically describes what the

defendant did."

The *only* other articulated reason for the Court's ruling on which Guideline to use as the base offense level for the offense conduct was that the people of the State of California, or "the public at large" was the principal (or the only) victim.

Findings/Rationale For "Vulnerable Victim" Adjustment

The Government and the defense objected to the recommendation in the PSR that the offense level be adjusted upward under U.S.S.G. Section 3A1.1(b)(1) Again, the trial court rejected those objections and found the "vulnerable victim enhancement" to be "absolutely appropriate."

Calling it "central to my assessment" and "irrefutable," the district court found that "the defendant used his power to exploit Pifen Lo." After discussing the nature of the legal and human relationship between Petitioner and Ms. Lo, the court stated: "All of us were the victim in that sense. But Pifen Lo was the most direct victim."

Rulings/Findings Regarding Defendant's Objections

In his sentencing papers Petitioner objected generally to all references in the PSR to Lo as a victim, all statements or inferences that Lo was coerced into the sexual relationship disclosed in the Information, Plea Agreement and Stipulated Statement of Facts, and to the apparent assumption in the PSR that a statement by Lo was a true fact, merely because she stated it. Defendant sought by these objections to require the district court to make findings on each area, which findings would support the stipulated offense Guideline calculations in the Plea Agreement.

In ruling on the defendant's objections, the court stated:

> "I find it noteworthy that the defendant himself has not submitted a letter or a declaration to the court."

The court refused to rule on objections relating to the statements or implication in the PSR that Petitioner "coerced Lo into having sex" because [as the district court stated] "I have not determined that there was coercion *in a forceful sense*." Nevertheless, without ruling on objections to explicit statements, or implications of "coercion," the district court found "that there was an inherent coercion through the power relationship or imbalance."

In ruling on an objection related to whether or not Petitioner used threatening language with Lo, the district court said:

> "I don't see any basis to refute language and the information in the presentence report, that the defendant said that if she wanted her husband released early, she should pay a price, that he used the words 'you know what I want' that he did certain other things I won't get into." So I reject that objection. I don't think there's a basis for it."

Defendant argues below that this finding reflects the general approach to the objections of both parties, which was to presume that any allegation by anybody which was quoted or referred to in the PSR was presumptively true, and placing the burden on the objecting party – the defendant – to disprove it, or the objection was overruled, and the PSR statement (of what,

in this case Lo had alleged) was found by the district court to be true, and used as a basis for the increased sentence. This approach violated both the proper conduct of a sentencing hearing where objections to facts alleged in the PSR are made, and violated this defendant's Fifth Amendment privilege against self-incrimination, by shifting to him the burden of proof on the facts to which he objected.

Similarly, when an objection to an allegation regarding when sexual contact was initiated was made, the district court said:

> "As I construe the objection, it's basically that the information in the presentence report indicating it occurred on the date mentioned, September 22nd, '96, is uncorroborated. The lawyers say in their objection that it's denied. But it's not denied with any percipient denial that would refute it. There is no declaration. There is no letter. There is no independent basis for me to find that it is unreliable. * * * [B]ut its not refuted, so I reject it."

Defendant argued, as a sub-issue, that Pifen Lo could not be considered to be the victim of "relevant conduct" under Section 1B1.3, unless the conduct was proven, by evidence produced at the hearing, that the sexual relationship between Petitioner and Lo was "criminal conduct," since it was not alleged in the Information to be criminal conduct, and the plea agreement and stipulated facts do not establish it was criminal conduct. Rejecting this argument, the district court stated:

> "As to what is within the meaning of relevant conduct, I think the defendants are not correct in asserting at Page 16 of their objections that relevant conduct has to be criminal conduct inherently. Section 1B1.3 of the Guidelines says otherwise and we sentence people based on relevant conduct that is not inherently criminal all the time. So I don't think there's anything unusual about that in this case."

When the defense objected that the court was considering the defendant's failure to testify under oath about specific allegations of Lo that he threatened her, the court asked the Government what those statements in the Probation Report were based on, and the Government said "those were statements that she made" and "I have seen investigative reports to that effect." Defense counsel further articulated the objection as follows:

> "We believe those, that that statement is an accurate recitation of what Lo said. Our objection is to the probation report containing that statement as a true fact. [¶] It would require the court to evaluate Lo's credibility on that point and it's something that by objecting, the defense is entitled to deny and put in issue. [¶] The government has responded that it's not relevant. For the court to make a finding against the defense on the basis of the defendant's silence on the point at the hearing or not to support the objection with evidence, we contend would be a legal error."

The court responded, "I can tell you that it just doesn't matter whether they [the threatening statements] were made."

After lengthy argument the court continued to re-articulate its finding that Lo was "vulnerable" and that the relationship was inherently coercive, even if her husband sent Petitioner an extortion letter (threatening to reveal the relationship if the defendant (Judge Trammell) did not grant him a new trial). The Court said:

> "You don't have to be powerless to be vulnerable. You don't have to be doing something entirely against your will without any possible positive, self-serving benefit that might come out of it."

and

> "I'm not sentencing someone for having an affair. That's not what this case is about and it's not what I'm doing."

In an apparent effort to ask the court to find that it was not relying on the defendant's silence in ruling on what the facts of this case are, the Government asked the court to clarify its earlier statements, objected to as violative of the Fifth Amendment. In response, the Court stated:

> "... I don't think I could do better than what I did at some considerable length at the beginning in terms of clarifying what my position is. When those factors that were objected to were not in any way a factor in my thinking or determination, I said so. So I'm not going to go

over it again."

The district court never acknowledged the burden shifting, or the Fifth Amendment issue presented in the *De Jesus* case, and explicitly raised by Petitioner's counsel at the sentencing hearing.

Rulings/Finding Relevant To Where In The Range To Sentence

In fixing the sentence at 27 months, the mid-range of Offense Level 17 (in criminal history category I), the court relied most heavily on defendant's failure to admit that he had engaged in the sexual relationship with Lo when investigators inquired of him. Defendant argued that failing to disclose the affair was the essence of the charged criminal conduct and already accounted for in the Guideline adjustments.

SUMMARY OF ARGUMENT

Under the facts of this case, as alleged in the Information and stipulated to by the parties in the Plea Agreement, the proper Guideline was U.S.S.G. Section 2C1.2, and there was no basis for an upward adjustment under U.S.S.G. § 3A1.1(b)(1).

The district court erred in sentencing Petitioner to any sentence greater than 18 months by erroneously finding the proper base offense level was 10 under U.S.S.G. § 2C1.7, and by erroneously finding that Lo was a victim of this fraud case. If for no other reason, the vulnerable victim finding was erroneous because the essence of the fraud was the defendant's failure to disclose he was in a sexual relationship with Lo, and there was no evidence, and no finding, that he failed to disclose

that fact to her. In addition, the sparse case law Petitioner has located appears to unanimously reject the temptation to which the district court succumbed here – including specific individual members of the public who are vulnerable in some way as "vulnerable victims" of a fraud prosecuted on the theory that an official has deprived "the People" of his honest services.

At the sentencing hearing, the district court misapplied both the federal rules governing the making and ruling on objections to statements of fact in the PSR, and improperly shifted the burden to the defendant to disprove any fact alleged, on the basis of which the court found this case fit into a higher offense level, or that there was a "vulnerable victim" here.

On the record of this case, the highest Guideline sentence allowed was 24 months, absent an upward departure (and no basis for such a departure was identified).

The sentence should be vacated with directions to the district court to re-sentence defendant within the proper Guideline range, and with directions that the district court must not place a burden on the defendant to disprove the facts alleged by Lo and repeated in the PSR, but that the burden of proving any fact which forms the basis of an upward adjustment in the sentence, or a higher based offense level, must be place on the Government.

(1)

THE DISTRICT COURT ERRONEOUSLY PLACED THE BURDEN ON THE DEFENDANT TO DISPROVE FACTS TO WHICH HE OBJECTED IN THE PSR

Questions of constitutional law, and pure questions of law, such as the proper or constitutional allocation of the burden of proof, are reviewed *de novo*.

In *Mitchell v. United States*, 526 U.S. 314, 316-17, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Court considered, "whether in determining facts about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence." The Court held "a sentencing court may not draw the adverse inference." *Id.*

Here, the district court clearly violated the *Mitchell* rule. The following remarks by the district judge in this case violated Petitioner's Fifth Amendment privilege and impermissibly shifted the burden of proof to the defendant on the facts alleged by hearsay through the PSR from Pifen Lo. While there was no showing she was "unavailable," she clearly was not produced. The district court stated:

> "I find it noteworthy that the defendant himself has not submitted a letter or a declaration to the court."

Later, the Court re-emphasized its reliance on the lack of counter-evidence from the defendant under oath, stating:

> "The lawyers say in their objection that it's denied. But it's not denied with any percipient denial that would refute it. There is no declaration. There is no letter. There is no independent basis for me to find that it is unreliable. * * * [B]ut its not refuted, so I reject it."

Petitioner's argument in the district court that Lo's statements were unreliable and uncorroborated is virtually indistinguishable from the argument the defendant in *Mitchell* made in the district court, referring to his testifying co-defendants who had pled guilty and become government witnesses. Here, the evidence from Lo was far less reliable, however, since: (a) as the court below acknowledged, she may have had a self-interest in her sexual relationship with Petitioner; (b) her defendant husband, facing a life without parole sentence, used that sexual relationship in an attempt to extort Petitioner (sitting as a judge) to grant him a new trial; and (c) Lo continues to seek benefits from her allegations against Petitioner.

Despite the Government's candid admission that the evidence it had that corroborated Lo's contested statements[2] was only the investigative reports of those statements, the district court persisted in its finding that because there was nothing offered by the defendant, no "declaration," no "letter," the defense objections to Lo's statements must be rejected because the defendant had failed to refute Lo's statements recited in the PSR.

The district court said:

> "I don't see any basis to refute language and the information in the presentence report, that the defendant said that if she wanted her husband released early, she should pay a price, that he used the words 'you know what I want' that he did certain other things I won't get into." So I reject that objection. I don't think there's a

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[2] I.e., Statements suggesting coercion, or threats.

basis for it."

Even after Petitioner's counsel cited the Ninth Circuit case applying the rule of *Mitchell*, *supra*, *United States v. DeJesus*, 217 F.3d 638, 642 (9th Cir.1999) (*DeJesus*),[3] and the Government sought to sanitize the district court's apparent reliance on the defendant's failure to testify or offer his own statement at sentencing, the Court never acknowledged this issue, or changed its ruling. The Court first repeated that it was "noteworthy" that there was no "letter" or "declaration" from defendant to refute the PSR, and then stated, "I don't think I could do better than what I did at some considerable length at the beginning in terms of clarifying what my position is. * * * So I'm not going to go over it again."

Under these circumstances, the district court's findings against Petitioner, in support of both adverse Guidelines calculations, and in determining where in the range to sentence defendant, must be reversed.

As the Court in *DeJesus* held:

> "By focusing on the defendant's silence at sentencing and quantitatively weighing it against the government's 'untested' evidence, the district court effectively shifted the burden of proof at sentencing to the defendant. In so doing, the district court erred. 'The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the

[3] Which the district court, ironically, had itself cited on the issue of whether the facts must be proven by a preponderance of the evidence, or by clear and convincing evidence.

> expense of the self- incrimination privilege.' *Mitchell*, 526 U.S. at 330, 119 S.Ct. 1307. ' "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." ' *Id.* at 326, 119 S.Ct. 1307 (quoting *Estelle v. Smith*, 451 U.S. 454, 463, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)...." *Id.*, 217 F.3d 638 at 646.

In addition, the concluding comments of the decision in *DeJesus* is also *apropos* here, because although defense counsel explicitly objected that the court had not considered Lo's credibility before concluding that her uncorroborated allegations were credible, and sufficient to prove all of the facts the court found as true, the district court refused to even address the question. This court condemned the district court's similarly based findings in *DeJesus* as follows:

> "[T]he district court determined that . . . [an aggravating fact was true] based on the quantum of evidence, not on the convincing force of the evidence. In so doing, the court deprived Mezas De Jesus of his due process interest in 'the accurate application of the Guidelines within statutory limits.' *Id.* Finally, by implicitly drawing an adverse inference from the defendant's silence and looking to the defendant to testify at sentencing against his will, the court violated Mezas de Jesus's Fifth Amendment privilege against self-incrimination.

Since here, the same error is present – the district court apparently based its findings that Lo's allegations outside of the stipulated facts were all true based on the fact that hers was the only evidence (albeit rank uncorroborated hearsay in most cases) on a point, rather than on "the force of the evidence," the entire sentence here must be vacated with directions to re-sentence defendant based only on the evidence presented, without any reliance on defendant's failure to offer his own statements "to refute" it.

(2)

THE RECORD FAILS TO SUPPORT, BY ANY STANDARD FINDINGS, THAT LO'S STATEMENTS OUTSIDE OF THE PLEA AGREEMENT OR STIPULATED FACTS ARE TRUE, AND THE DISTRICT COURT ERRED IN RULING ON OBJECTIONS TO LO'S UNRELIABLE STATEMENTS IN THE ABSENCE OF ANY EVIDENCE TO SUPPORT THEM.

Rule 32 of the Federal Rules of Criminal Procedure, subdivisions (b)(6)(B) and (b)(6)(D), provide the defendant with the right to object to portions of the PSR and require the Court to *either* make a specific finding on the objections interposed, or find that the objected to material will not affect sentencing. (See Rule 32(c)(1).)

Federal Rule of Criminal Procedure 32 requires that, "[f]or each disputed fact upon which the district court intends to rely in imposing the sentence, the district court must make an explicit factual finding that resolves the dispute." *United States v. Carter*, 219 F.3d 863 (9th Cir. 2000). In *Carter*,

supra, the Court reversed the judgment and remanded for reconsideration of the sentence based on the district court's failure to rule, explicitly, on the defendant's objections to the conclusion in the P.S.R. that the defendant's sentence should be adjusted for a role enhancement. (See also *United States v. Standard*, 207 F.3d 1136, 1141, 1143 (9th Cir. 2000).)

The PSR portrayed the events in which the crime of conviction was committed in terms which would drastically altar the sentencing range.

Under the Guidelines calculation the parties agreed to, there was a sentencing range of 12-18 months.[4] But, the PSR concluded the sentencing range should be 24-30 months based on the view of the facts taken in the PSR.

In his Sentencing Memorandum, Petitioner objected to all the facts that went beyond the Plea Agreement and Stipulation of Facts entered into with the Government.

Although the district court *said* it did not consider some objected to material (such as statements that Petitioner coerced Lo), by and large, the district court either explicitly, or *sub silencio*, overruled his objections. Clearly, even when the court stated it was disregarding an adverse fact alleged in the PSR, but objected to by the defense, it frequently found that identical fact against the defendant in some other way.[5]

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[4] The Offense Level agreed to is Level 13, which in Criminal History Category I (which the PSR states Defendant is in [cf., paragraph 94, p. 20]) results in a sentencing range of 12-18 months.

[5] The district court's finding that it was not going to consider any implication that coercion was used is a good example. After no ruling on the objection to this statement, the district court went forward to find that there was "inherent" coercion. When counsel for defendant continued to

(continued...)

Just as clearly, no evidence was offered to support any claim by Lo, recited in the PSR, that she was coerced, inherently, or in any other way. Indeed, the Government scrupulously, if not vigorously, clung to its position that it was bound by the Plea Agreement.

The district court nevertheless found that all of the objected to facts in the PSR, which in any way supported a finding that this case, did not fit into the stipulated Guideline Section (2C1.2), but, instead more closely fit into a Guideline which the PSR suggested was appropriate *because* it more closely fit the facts (including the objected to facts) set forth in the PSR.

In this case, the facts objected to were relied on by the district court to increase the base offense level by bringing it within U.S.S.G. § 2C1.7, rather than § 2C1.2, and to apply an upward adjustment for a "vulnerable victim."

But, to support any such increase, case law is clear that the burden is on the Government to prove such facts.

In *United States v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1989) the Court held "the government bears the burden of proof if it is attempting to adjust the offense level upwards, but the defendant bears the burden of proof if he is attempting to lower the offense level." In a further discussion of burdens of proof at sentencing, the *Howard* Court reasoned that since it is the Government that seeks to incarcerate the defendant in the first place, "the government should bear the burden of proof for

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[5](...continued)
object, the district court warned him that he was not helping his cause and entreated him to cease. ("You're not serving your own interests by rearguing the issue of whether or not there was coercion.")

any fact that the sentencing court would find necessary to determine the base offense level." (*Id.*, at p. 1090).

Here, the Government explicitly agreed in the Plea Agreement there were no facts that would result in "additional specific offense characteristics" or "offense level adjustments." And, they offered no evidence to support either a different base offense level from that included in the Plea Agreement, nor to support an upward adjustment for a vulnerable victim.

Under these circumstances, this Court is urged to conclude that the record does not support the district court's findings, or any factual findings outside of the plea agreement and stipulated facts, which might support the higher sentence handed down.

(3)

THE DISTRICT COURT ERRED IN INCREASING THE SENTENCE BASED ON A VULNERABLE VICTIM ADJUSTMENT

The plea agreement correctly omitted any upward adjustment for a vulnerable victim in this case for two reasons: (a) the victim in a case of this nature is a collective concept – the People of the State of California – not any particular person; (b) Pifen Lo, the person with whom the defendant was engaged in a secret relationship (detailed in the stipulated facts in the plea agreement), was by no means a "vulnerable victim" of the crime charged here, to which defendant has pled guilty.

The "People of California", collectively is the victim. This case does not involve a crime committed against a person, but involves a crime committed against the trust of the People

of the State of California by virtue of the defendant's failure to disclose his secret romantic relationship with a party to an action before the court on which he sat as a judge.

Moreover, while it is true that Ms. Lo was on probation, and that the defendant was the Judge who granted her probation, this situation at best demonstrated an act of leniency which the People (as the plaintiff in the case) might have had an objection to, had the People suspected any extra-legal relationship between the Judge and Ms. Lo.

Contrary to the suggestion that this relationship alone establishes that Pifen Lo was a vulnerable victim in this case, it does not even show that she was a victim. There are several problems with the idea that Pifen Lo was a victim or the victim in this case.

First, none of the elements of the crime of mail fraud involve or require the conclusion that any offense *against Pifen Lo* was committed. Moreover, in order to conclude that this woman was a victim *or the* victim of the crime charged here, it would be necessary to identify some other, related crime of which she was an actual victim. Indeed, the Guidelines themselves require this.

> "*For purposes of subsection (b), 'vulnerable victim' means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.*" (*Application Note 2,* Commentary,

USSG § 3A1.1(b) [1st ¶].)

Whether Pifen Lo is viewed as vulnerable or not, she is not a vulnerable victim unless she is the victim of "the criminal conduct" (either charged, or for which defendant is accountable as "relevant conduct.")

Before other conduct counts as relevant conduct under Section 1B1.3, it must be: criminal conduct, which is either a crime the defendant aided or counseled or encouraged (§ 1B1.3(a)(1)(A)) or, in the case of "jointly undertaken criminal behavior, "all reasonably foreseeable acts or omissions" of others.

Whatever else might be required, to be "relevant conduct" it is clear that the conduct at issue must be criminal conduct, and the person identified as a "victim" of such conduct must be the victim of a crime. Contrary to the district court's bald statement that courts sentence people for "relevant conduct" which is not criminal "all the time," the Guideline Application Notes 1 and 2 to the Commentary to Section 3A1.1(b) clearly refer only to criminal conduct as relevant conduct. For example, Note 1 explains that relevant conduct is relevant regardless of why the defendant is criminally liable for it, "whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator." Note 2 states what is explicit in §1B1.3(1)(B), that jointly undertaken criminal activity is included. There simply is no support in law found by counsel for Petitioner for the idea that non-criminal conduct can be "relevant conduct" as the district court found.

Neither the PSR nor the district court identified any crime of which Lo was a victim. The Government did not charge defendant with any such crime, but instead has

stipulated that there are no other facts known to it which would result in an upward adjustment to the sentence.

Under these circumstances, this Court is urged to conclude that Lo is not a "vulnerable victim" within the meaning of USSG § 3A1.1(b), in this case, because she is not a "victim" of any crime proven by any evidence in this record.

Whatever crime might be posited would include elements and facts which would have to be alleged and proved. There is no sense in which the plea agreement constitutes any admission of any crime *against* Ms. Lo. Indeed, the plea agreement clearly identifies the criminal conduct of the defendant as completely dependent upon his failure to disclose what was going on between the defendant and Lo. The plea agreement does not indicate that any particular factor motivated Lo or Defendant to engage in that conduct.

Petitioner submits that the Guidelines do not permit, let alone encourage an upward adjustment for any perceived vulnerability of a non-victim who happened to be involved with him under these circumstances.

Nor was it proper for the Court to engage in sophistic reasoning of the form: *Since Pifen Lo is one of the People of the State of California, she is one of the victims, and as such, if she was vulnerable, then the vulnerable victim adjustment is appropriate.* The Commentary to the vulnerable victim Guideline states the upward adjustment "would not apply [in a fraud case] where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile." (*Application Note 2,* Commentary, USSG § 3A1.1(b) [2d ¶].)

To the contrary, the law recognizes that in a fraud case, the victim is the person or entity that is kept in the dark about material facts which, if disclosed, might have led that person or entity to act differently. There is no possible theory on which Pifen Lo was the person defrauded in the crime charged to which the defendant has pled guilty. Rather, the individual people who may have been deceived by the failure of the defendant to disclose his conflict of interest were the lawyers for the prosecution in the case against Pifen Lo's husband, Jin, and his co-defendants. But those lawyers were not individual victims, and even if one or more of them was particularly easy to fool, they would not qualify as "vulnerable victims" for the purpose of an upward adjustment in this case. Rather, the only victim of this crime is the People of the State of California, collectively.

In *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), this Court rejected the reasoning of lower courts "holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. See, e.g., *United States v. Mandel*, 591 F.2d 1347 (CA4 1979), aff'd in relevant part, 602 F.2d 653 (en banc), cert. denied, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). Under these cases, a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." *McNally*, at p. 354.

Clearly, the thrust of the cases at issue in the *McNally* case was the idea that the victim was "the public," which was defrauded out of the "honest services" to which it (i.e., the public, as a concept) was entitled based on the public official's duty to serve honestly in the post held. Just as clearly, the legislative history of the particular statute defendant pled guilty to violating the statutory language in 18 U.S.C. § 1346 clearly

establishes that it was the holding of *McNally* that Congress had in mind in enacting the language which defines the crime of conviction here.

Lo is also not a vulnerable victim of the fraud committed because she was not defrauded – the public was – and no particular member of the public is *the* victim.[6]

Even if the relationship of Lo and defendant is considered a part of the crime (and under the evidence it was at most an immoral and unethical but not a criminal relationship), there is no evidence that Lo's status as a probationer or defendant's status as the judge that placed her on probation created the relationship. Rather, there is a series of events which suggests strongly that Lo was the person who initiated the relationship in an effort to create two types of leverage over defendant: (1) to persuade him of her affection for him, in order to attempt to persuade him to act favorably toward her (regarding property) and toward her husband, Jin; (2) to create a basis for threatening to expose the relationship as pressure on defendant to make favorable rulings for Jin.

Among the evidence which suggests these facts are the following:

1. In September (at the latest), Jin became aware of the sexual involvement of his wife (Lo) and the Judge.

2. Well after that Jin moved to disqualify the

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[6] If *any* member of the public counted as a victim then every case of defrauding the public of honest services could include a vulnerable victim enhancement since clearly many members of the public are vulnerable within the meaning of the guidelines.

Judge but did not mention that relationship.

3. Jin filed a motion for new trial, but did not mention the relationship.

4. Thereafter, Jin wrote a letter intended to be delivered by Lo to the Judge threatening to expose the relationship with Lo if the motion for new trial was not granted.

5. Lo and defendant conversed about the fact that the judge would withdraw from the case if Jin persisted in his motion to disqualify.

6. The next day Jin withdrew his motion to disqualify the Judge (Defendant).

7. The Judge then retired, resulting in the case being reassigned, and the motion for new trial being denied.

8. At that point, when Jin no longer had any leverage against defendant based on the relationship between defendant and Lo, Jin filed a petition for writ of habeas corpus alleging the impropriety of the relationship, and sought a new trial on that basis from another judge.

Finally, it is clear from the Guidelines themselves that regardless of which Section is used for the base offense level (§2C1.7 or 2C1.2), even under the district court's view of this case, an additional upward adjustment for a vulnerable victim was improper because it was based entirely upon the status of the defendant as a powerful judge with power over the case

before him.

Petitioner submits that the 8-level increase based on his status as a high-ranking official with decision making authority, which was a part of the stipulated Guideline calculation in this case, and which was required to be imposed under *either* of the Guidelines (see USSG § 2C1.2(b)(2)(B), and §2C1.7(b)(2)(B)) used to determine the base offense level, fully accounted for the facts on which the district court's upward adjustment for a vulnerable victim was based. Clearly, the disproportionate power in the hands of the class of persons to whom this 8-level increase applies, accounts for precisely the type of advantage the district court found Petitioner took of his position in his relationship with Lo.

In the absence of the district court's erroneous conclusion that every statement of Lo recited in the PSR was true, which conclusion violated both the Fifth Amendment and due process because it shifted the burden of proof (which the law places on the Government) to disprove the facts relied upon to increase the sentence, the district court's factual finding that Lo was vulnerable in the relationship described in the Information must be reversed, even if there were some lawful way to conclude she had been a victim of this crime, or a victim in this case, under the Guidelines.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Court of Appeals affirming Petitioner's sentence.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 20th day of March 2002.

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